

Hasamuddin bin Talena v Public Prosecutor**A**

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J-05-28 OF 1995

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
18 FEBRUARY 2002

Evidence — Information leading to fact discovered — Information given by accused leading to discovery of dangerous drugs — Whether exact words used by accused must be proved — Evidence Act 1950 s 27

B

The appellant was arrested on suspicion of being involved with drugs. It was alleged that during the interrogation the appellant made a statement to the approximate effect that he could lead his interrogators to the place where certain drugs had been concealed. It was part of the prosecution's case that at the scene the appellant made a second statement and pointed to the place where the drugs were concealed. The police did in fact find a plastic packet which contained two smaller plastic bags, the contents of which upon analysis, proved to be 79.2g of heroin. The appellant was later charged, tried and convicted with trafficking contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. The issue in this appeal was whether the prosecution had satisfactorily proved the information leading to discovery which the appellant allegedly gave to the police in the course of investigation.

C**D****E**

Held, allowing the appeal:

Where the prosecution sought to rely on information under the inclusionary provisions of s 27 of the Evidence Act 1950, approximations were not permitted. In other words, the exact words spoken by an accused had to be proved. Since nothing more than the information given by an accused was admissible, it followed that the information must be exact and recorded in the language or words used by the accused. This strict test had not been met by the facts of the present appeal. The conviction in the present case was entirely unsafe (see pp 410H, 411C, F–G).

F**G**

[Bahasa Malaysia summary]

Perayu telah ditahan kerana disyaki terlibat dengan dadah. Adalah didakwa bahawa ketika interogasi perayu telah membuat kenyataan yang mempunyai kesan yang dianggarkan bahawa beliau boleh membawa interogator-interogator beliau ke tempat di mana dadah yang tertentu telah disembunyikan. Adalah sebahagian daripada kes pihak pendakwaan bahawa di tempat tersebut perayu telah membuat kenyataan kedua dan menunjukkan tempat di mana dadah tersebut disembunyikan. Pihak polis telah pada hakikatnya menjumpai satu paket plastik yang mengandungi dua beg plastik yang lebih kecil. Kandungannya setelah dianalisa, terbukti merupakan 79.2g dadah

H**I**

- A** heroin. Perayu telah kemudiannya dituduh, dibicarakan dan disabitkan dengan mengedar bertentangan dengan s 39B (1)(a) Akta Dadah Berbahaya 1952. Isu dalam rayuan ini adalah sama ada pihak pendakwaan telah membuktikan dengan memuaskan maklumat yang membawa kepada jumpaan tersebut yang mana didakwa telah diberikan oleh perayu kepada pihak polis dalam perjalanan penyiasatan.
- B**

Diputuskan, membenarkan rayuan tersebut:

- C** Di mana pihak pendakwaan cuba untuk bergantung pada maklumat di bawah peruntukan ‘inclusionary’ s 27 Akta Keterangan 1950, anggaran tidak dibenarkan. Dalam ertikata yang lain, perkataan-perkataan sebenar yang diucap oleh seseorang tertuduh haruslah dibuktikan. Oleh kerana tiada apa yang lebih daripada maklumat yang diberikan oleh seseorang tertuduh boleh diterima, maka maklumat tersebut mestilah tepat dan dicatatkan dalam bahasa atau perkataan-perkataan yang digunakan oleh tertuduh. Ujian tegas ini telah tidak dipenuhi menurut fakta-fakta rayuan semasa. Sabitan dalam kes semasa adalah sesungguhnya tidak selamat (lihat ms 410H, 411C, F–G).
- D**

Notes

- E** For cases on information given by accused, see 7 *Mallal’s Digest* (4th Ed, 1998 Reissue) paras 1421–1424.

Cases referred to

- F** *Muhamad bin Hassan v PP* [1998] 2 MLJ 273 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
Sandra Margaret Birch v PP [1978] 1 MLJ 72 (refd)

Legislation referred to

- G** Dangerous Drugs Act 1952 s 39B (1)(a)
 Evidence Act 1950 s 27

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Kamarul Hisham Kamaruddin (Deputy Public Prosecutor) for the respondent.

- H** **Gopal Sri Ram JCA** (delivering judgment of the court): There is only one point in this case. It is whether the prosecution has satisfactorily proved the information leading to discovery which the appellant allegedly gave to the police in the course of investigation.

- I** The factual matrix against which the point arises falls within a narrow compass. On 1 July 1993, the appellant was arrested on suspicion of being involved with drugs. While in police custody, he was interrogated by PW5 (Chief Inspector Nordin). It is alleged that during the interrogation, the

appellant made a statement to the approximate effect that he could lead his interrogators to the place where certain drugs had been concealed. Shortly thereafter, a police party that included PW5, PW6 and PW7 proceeded to the 24th milestone Pekan Nenas, Johor. It is part of the prosecution's case that at the scene the appellant made a second statement and pointed to the place where the drugs were concealed. The police did in fact find a plastic packet which contained two smaller plastic bags, the contents of which upon analysis, proved to be 79.2g of heroin. The appellant was later charged, tried and convicted with trafficking contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952.

At the trial of the appellant, evidence was adduced of the two statements to which reference has already been made. It was conceded by PW5; and there is no dispute about this; that the exact words used by the appellant during his interrogation or at the scene were not reduced into writing as soon as practicable. The prosecution, however, seeks to answer this by referring to exh P16. That document is a police report. It was lodged by PW5 on the day of the incident, but some 3½ hours after the appellant's alleged first statement. It was certainly after the discovery of the drugs. Exhibit P16 sets out the questions, that PW5 supposedly put to the appellant and the supposed responses to these questions. The learned deputy public prosecutor ('DPP'), who has very ably responded to this appeal argued, but with some diffidence, that exh P16 was a contemporaneous document in the circumstances of the case. With respect, we are unable to agree. A careful reading of the record, in particular the notes of evidence recorded by the learned trial judge, reveals no excuse or reason for PW5's inability to take down the questions put and the responses received, either during the interrogation or immediately thereafter. As a matter of practice, if it is not done immediately, but a little later, it might be safer to read the questions and answers over to the provider of the information to ensure that what has been put down on paper is exactly correct. That procedure is, however, academic here for the reasons already given.

In the case of the second statement, we see no difficulty in PW5 putting that information down in writing in his diary soon after returning from the scene.

These matters constitute some of the unsatisfactory features of this case.

There is, in our view, no dispute about the proposition of law that is applicable to the facts already narrated. It is settled beyond argument that where the prosecution seeks to rely on information under the inclusionary provisions of s 27 of the Evidence Act 1950, approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng v PP* [1992] 1 MLJ 137 at p 141, where Abdul Hamid Omar LP reminded us of the need for vigilance, 'to ensure the credibility of evidence by the police personnel in respect of this section, [that is, s 27] which is so vulnerable to abuse'.

A The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Sandra Margaret Birch v PP* [1978] 1 MLJ 72. This is what he said at p 72:

B Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery in this case the act of the appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd Desa's guilt still remain uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.

C Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and recorded in the language or words used by the accused.

D The strictness of the rule in the application appears sufficiently from the following passage in *Sarkar on Evidence* (14th Ed) at p 492:

E Statements made by accused to police officers which are or may be provable under s 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (see *Re Athappa Goundan* AIR 1937 Mad 618; *Re Ramamurthy* AIR 1941 Mad 290; *Nareish v R* 46 CWN 180; *PP v Pasala* AIR 1945 Mad 202; *PP v Venkoba* 1937 MWN 73, *Chenna v King Emperor* AIR 1940 Mad 710, *Gaya v State* AIR 1957 All 459; *Nathu v State* AIR 1958 All 46). No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

G We have addressed our minds to the question whether the strict test has been met by the facts of the present appeal. After anxious consideration we hold that it has not. The danger of abuse to which the Lord President referred in *Pang Chee Meng* appears to apply plumb to the present facts. These observations then lead us to the logical conclusion that the conviction in the present case is entirely unsafe. The learned DPP who argued this appeal has with customary frankness conceded that the entire prosecution's case rests on these two supposed pieces of information leading to discovery. Once they fall, so must the prosecution's case.

H The issues we have these far discussed make it unnecessary for us to address the other arguments raised by the appellant. Amongst these arguments was a submission based on the decision of the Federal Court in *Muhamad bin Hassan v PP* [1998] 2 MLJ 273. We are not saying that the submission is without merit. All we are saying is that it is unnecessary for us to deal with it.

I For the reasons already given, it is plain where our duty lies. The appeal is allowed, the conviction is quashed and the sentence imposed is set aside.

Before concluding, we wish to express our appreciation to learned counsel for the appellant and En Kamarul Hisham, the learned DPP without whose able assistance this judgment would not have been possible.

Appeal allowed.

Reported by Peter Ling

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